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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 240

HARRY HANSON,

Petitioner,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JAMES RAYMOND BERRY,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 240

HARRY HANSON,

against *Petitioner,*

LEHIGH VALLEY RAILROAD COMPANY.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice, and Associate Justices of the Supreme Court of the United States:

Harry Hanson, the petitioner herein, respectfully presents his petition for a Writ of Certiorari to review the final judgment of the United States Circuit Court of Appeals for the Third Circuit, by which judgment the judgment of the United States District Court for the District of New Jersey in favor of the petitioner and against the respondent in the amount of Seventy-Five Hundred Dollars was reversed and a new trial ordered. The judgment of the Circuit Court of Appeals was rendered on May 8, 1941.

I.

The Opinion of the Court Below.

The opinion of the court below was filed on the 8th day of May, 1941. It has not yet been officially published but

appears in the Advance Reports of the Federal Reporter for the week of —— 1941. A certified copy of the opinion is attached to and made part of the record used in the court below, which record completed as required by the rules has been filed in this court.

II.

Statement of the Case.

The plaintiff's action was brought to recover damages resulting from personal injuries sustained by him due to the alleged negligence of the defendant. The plaintiff was employed by Charles Merberg & Sons. Merberg & Sons were engaged in demolishing the refining plant of the American Sugar Company in Jersey City, New Jersey. This plant consisted of a large number of buildings occupying two square city blocks (R. 29, 11. 20-25). It was bounded on the east by Washington Street, on the west by Warren Street, on the north by Essex Street, and on the south by the Gap (a river) (R. 6 and 7; R. 30, 11. 1-20). Dudley Street, running east and west, was located approximately midway between Essex Street on the north and the Gap on the south (R. 30, 11. 20-25). A railroad track owned by the defendant was located on the center of Dudley Street, extending from Washington Street to and across Warren Street. This track had a slight down grade toward Warren Street.

The entire area occupied by the Sugar Company buildings, including both ends of Dudley Street, was enclosed by a fence (R. 34, 1. 20, to R. 35, 1. 20). This fence had been constructed by Merberg & Sons. It consisted of wooden posts extending upright four or five feet above the ground, with rails fastened from post to post at the top and midway between the top and the ground (R. 36, 11. 1-25). A gate was built across the track on Dudley Street at War-

ren Street (R. 34, 1. 20, to R. 35, 1. 20). Merberg & Sons maintained a day and night watchman to protect this area and their property contained within it (R. 33, 11. 20-23).

During the course of the work and in connection therewith the defendant railroad at the request of plaintiff's employer, delivered gondola type freight cars to Dudley Street at the point where the work of demolition was in progress. This delivery of freight cars was stipulated between the parties at the outset of the trial, the stipulation being as follows:

> "First, the defendant delivered railroad cars including the one referred to in this case to Charles Merberg & Sons, Inc., upon the request of one of its employees" R. 4, 11. 8-11).

This stipulation is probably the most important single fact in the case. It will be observed that by it the defendant admits an unconditional and unqualified delivery to Merberg & Sons, Inc. No limitation upon the use or the manner of use of the cars by Merberg's employees in the course of their work is either stated or inferable. Emphasis is placed upon this agreement of the parties at the outset of the statement of facts because the plaintiff contends that it established and fixed his rights on the freight car on the date of his accident and, further, because the Circuit Court entirely overlooked it in rendering its decision.

These cars would be placed by the defendant's employees. It was the custom and practice of the defendant's employees upon delivering the car to apply the hand brake and to place a piece of wood called a chock in front of one of the wheels (R. 4, 5, 8, 11. 20-25; 9 11. 5-10). This custom and practice was also admitted by the defendant as part of the stipulation above referred to (R. 4, 5). Unconditional control, custody and supervision of the cars passed to plaintiff's employer after their delivery.

On the afternoon of September 22, 1936, a train crew of the defendant placed a fifty foot car on the Dudley Street track (Dudley Street according to the same stipulation being a public highway (R. 4, 11. 17-20) about fifty feet from Warren Street and on the slight down grade (R. 36, 11. 10-20)). At the trial, defendant offered testimony to show that before leaving it they applied the hand brake and placed a chock in front of one of the wheels (R. 332-334). This fact was in dispute, the plaintiff contending that the jury was entitled to infer from all of the proof that the car was not braked or chocked as described, or that if the car was braked or chocked, the operation was done negligently.

The plaintiff, Harry Hanson, was in the employ of Merberg & Sons, Inc. as its superintendent. He was in charge of the work of demolition (R. 7, 1. 18).

The work was commenced on May 1, 1936, and had progressed continuously from then until the time of the accident (R. 7, 1. 11). The buildings being demolished were constructed of brick supported by steel girders. These walls were torn down and the steel and scrap iron removed. Naturally, the nature of the work occasioned the gatherings of large quantities of brick, lumber and debris of steel which covered the ground of the entire operation (R. 9, 11. 12-20). The nature of this condition can best be understood by an examination of the photograph (Exhibit P-1). The walls of the buildings were torn down by the use of a crane and tractor similar to the one appearing in the photograph. The method employed was to attach one end of a heavy steel cable to the arm of the crane and the other end to the wall which was being demolished. Strain would then be placed upon the cable and the wall pulled down. From the debris the scrap iron would then be removed, placed upon the railroad cars and transported by the defendant as a common carrier. Depending upon the location of the debris and of the wall to be demolished, the opera-

tion of the crane was frequently hampered by reason of lack of space.

The wall which was being torn down at the time of the accident was located upon the northerly side of the track and distant about one hundred and fifty feet from the railroad car. The space between the northerly side of the track and the wall was so covered with debris that it was necessary to operate the crane from the south side of the track (R. 11, 11. 8-25), and as a result of this the car lay between the crane and the wall. Two of the plaintiff's coemployees attached the steel cable, which was seven-eighths of an inch in diameter, to the crane and two others who were upon the wall of the building attached the other end to it (R. 113, 11. 8-18; R. 113, 1. 20). Pressure was then applied by the crane operator and the slack taken out of the cable. As this was done, it was observed that if the pressure necessary to tear down the wall was applied, the cable would come in contact with the side of the railroad car (R. 114, 1. 8). This was not the only time when it was necessary to operate the crane when the car was between it and the wall to be pulled down. On previous occasions defendant's employees had placed cars on the track in such position that they knew or should have known that the ordinary operation of the crane might cause the cable to come in contact with the car and that if this did occur, it would be necessary for one of the employees of the contractor to board the car and take some means of preventing damage to the car or cable. On previous occasions when the cable had come in contact with the car, it was the common practice to place a wooden plank between the cable and the car in order to prevent damage to either (R. 119, 11. 8-12). For the purpose of doing this and of then continuing his direction of the operation, Hanson boarded the car. Having placed the plank beneath the cable, thus preventing its coming in contact with the steel

car, he signaled the crane operator to take the slack out of the cable (R. 15, l. 3). It may be important to point out that the pressure which was applied to take the slack out of the cable was considerably less than that necessary to tear down the wall (R. 15, l. 10) and it was inferable that the comparatively light pressure applied would have been insufficient to have moved the car had the brakes been properly applied. The crane operator followed the plaintiff's directions and having turned the crane to the extent necessary to tauten the cable, brought it to a stop and awaited Hanson's order to apply the pressure necessary to tear down the wall. After the crane came to a stop, the car moved down the grade, as a result of which the plank was released and was thrown back into the car, striking the plaintiff and injuring him (R. 15, l. 15).

Thomas Del Duca and John Hansen boarded the car immediately in order to aid the plaintiff, who had fallen and was lying on the floor of the car. In doing so, Del Duca grabbed the brake wheel and it swung with him (R. 115, ll. 13-25). This fact is of extreme significance because the brake wheel cannot be turned in this way if the brake is properly applied (R. 116, ll. 6-14). It is not in dispute that in order to put the brake in working order, it is necessary to affix a cog or "dog" in a ratchet at the lower end of the brake after the brake wheel has been fully tightened. When this is done, the brake wheel cannot be turned, nor the brake in any manner released until the cog or "dog" is first lifted from the ratchet. There is no denial, therefore, that if the testimony of Del Duca is correct, the brake was not in working order at the time of the accident. There is also testimony by John Hansen to the same effect as that of Del Duca (R. 172, ll. 11-16).

Both witnesses also testified that there were no chocks under the car wheels when they inspected them sometime

after the accident, and this is borne out by the testimony of defendant's witness, James Menge (R. 340, 11. 4-8).

The trial court submitted the issues of the negligence of the defendant, contributory negligence and assumption of risk of the plaintiff and invitation of the plaintiff to be on the car at the time and under the circumstances of the accident to the jury. These issues were resolved against the defendant and in favor of the plaintiff and a verdict of Seventy-Five Hundred Dollars returned. The judgment entered on this verdict was ordered reversed by the Circuit Court of Appeals, which declared that as a matter of law the plaintiff was a licensee and not an invitee on the defendant's car at the time of his injury.

III.

Grounds on Which the Jurisdiction of This Court is Invoked.

This action was originally instituted in the United States District Court for the District of New Jersey. The petitioner is a citizen of the State of Connecticut, the defendant is a corporation of the State of Pennsylvania and the amount in controversy is in excess of Three Thousand Dollars.

The date of the final judgment to be reviewed is May 8th, 1941, on which day the opinion of the Third Circuit Court of Appeals and the judgment adverse to the petitioner were entered.

The petition here for a Writ of Certiorari is made under authority of Section 240 of the Judicial Code (28 U. S. 359 § 347) which expressly authorizes this court to require a cause to be certified to it for determination after judgment in a Circuit Court of Appeals.

The accident suffered by petitioner happened in New Jersey. Consequently, his right to recover must be determined by the common law of the State of New Jersey

(Erie R. R. Co. v. Tompkins 304 U. S. 64). Petitioner believes and prays that this court should take jurisdiction because the decision of the Third Circuit Court of Appeals is in conflict with the decisions of the courts of the State of New Jersey on similar problems (Riley v. Jersey Leather Co., 100 N. J. L. 300; 126 Atl. 457; Bryan v. Warner Quinlan Co., 141 Atl. 809, 104 L. 534; Murphy v. Core Joint Concrete Pipe Co., 110 N. J. L. 83, 164 Atl. 262; Standard Steel Car Co. v. McGuire, 161 Fed. 527, 3rd Cir.; Furey v. N. Y. Central R. R. Co. 67 L. 270, 51 Atl. 505; Dettmering v. English 64 L. 16, 44 Atl. 855; Land v. Fitzgerald 68 L. 28, 52 Atl. 229.

A further reason of utmost importance why this court should take jurisdiction is that the Circuit Court overlooked the stipulation of the parties which established plaintiff's status as an invitee on defendant's freight car. The restricted view of the plaintiff's status adopted by the court will work hardship and injustice upon him unless this court grants him a review of the case.

The decision also appears to be in conflict with the decisions of other Federal Circuit Courts of Appeal and with the decisions of the Appellate courts of other jurisdictions whose common law on the subject is the same as that of New Jersey.

Cudahy Packing Co. v. McBride, 92 F. (2d) 737 (8th Cir.) Cert. den. 303 U. S. 639. Gunnarson v. Robert Jacob Inc. 94 F. (2d) 170 (2nd Cir.) Cert. den. 303 U. S. 660; Norfolk Tidewater Terminals v. Wood Towing Corp. 94 F. (2d) 164 (4th Cir.); Kuptz v. Ralph Solitt & Sons, 88 F. (2d) 532 (5th Cir.); Henry W. Cross Co. v. Burns, 81 F. (2d) 856 (8th Cir.); Randolph v. Great Atlantic & Pacific Tea Co., 2 Fed. Supp. 462 aff. 64 F. (2d) 247 (3rd Cir.); Standard Oil Co. v. Robbins Dry Dock Co., 25 F. (2d) 339 (2nd Cir.); Fleischman Malting Co. v. Mrkacek, 14 F. (2d) 602 (7th Cir.); Middleton v. P. Sanford Ross, 213 F. 6 (4th Cir.); Langau v. Tyler, 114 F. 718 (2nd Cir.); Weatherford, M. W. & N. W.

Ry. Co. v. Duncan 32 S. W. 878 (Tex.); Pittsburg, C. C. & St. L. Ry. Co. v. Cozatl 79 N. E. 534 (Ind.); Rio Grande, E. P. & S. F. Ry Co. v. Gurzman 221 S. W. 1102; Baltimore & O. R. R. Co. v. Davis, 137 Atl. 30 (Court of Appeals, Md.); Welch v. Maine Central R. R. Co., 30 Atl. 116 (Me.); Lenard v. Kneeland 154 N. E. 94 (Mass.); Moffit v. Grand Rapids Ry. Co., 200 N. W. 274 (Mich.).

IV.

Specifications of Error.

The Circuit Court of Appeals erred when it held that the plaintiff exceeded the scope of the defendant's invitation by being on the freight car for a purpose other than loading at the time of his accident.

V.

Statement of Questions Presented.

1. Was the plaintiff, Hanson an invitee or a licensee on the freight car of the defendant at the time of his accident?

2. Was sufficient evidence adduced at the trial showing or tending to show that the defendant's employees failed to brake and chock the freight car or failed to brake and chock the car properly, in accordance with the admitted practice and customs, to justify the trial court in submitting the problem to the jury for determination?

Wherefore, your petitioner respectfully prays that a Writ of Certiorari issue to the Circuit Court of Appeals for the Third Circuit, and submits his brief hereto attached in support of his petition.

Respectfully submitted,

JAMES RAYMOND BERRY,
Counsel of Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 240

HARRY HANSON,

Petitioner,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of Facts.

The salient facts are set forth in the "Statement of the Case" which appears in the Petition for the Writ of Certiorari. It may be necessary to refer to a few additional portions of the testimony during the course of the argument but the substance of the problems presented by the Petition is in this outline and with the Court's permission, the facts will not be repeated here.

POINT ONE.

The Circuit Court of Appeals erred in holding that the plaintiff exceeded the scope or limits of defendant's invitation by being on the freight car for a purpose other than loading at the time of his injury.

a) *The Stipulation.*

As indicated by the statement of facts, Hanson had gotten on the defendant's freight car immediately prior to the acci-

dent for the purpose of placing a plank between the cable, which extended from the crane to the wall of the building, and the top edge of the car. This was a necessary course of conduct to protect the cable and the car. It had been done on previous occasions on the job.

Judge Clark, writing the opinion for the Court, said that the invitation from the defendant to plaintiff's employer and consequently to him to be on the freight car, extended only to the loading of the car. Since the plaintiff was thereon for a purpose other than loading, he thereby transformed himself from an invitee to a licensee. Consequently, the only duty owed to him by the defendant was to abstain from wilful or wanton injury. No proof of wilful or wanton injury being present, the judgment was ordered reversed.

In so holding, the stipulation of the parties relating to the delivery of these freight cars was overlooked entirely. It was to the effect that "the defendant delivered railroad cars including the one referred to in this case to Charles Merberg & Sons, Inc. upon the request of one of its employees." Merberg was Hanson's employer. Whatever rights Hanson had to be on the freight car came to him derivatively through Merberg. Those rights were the same as Merberg's and were measured as were Merberg's for purposes of the trial by the language of the stipulation. It will be observed that under the stipulation the cars were unqualifiedly and unconditionally delivered to Merberg at the site of its demolition operations. As the defendant said in its brief below it "had no control, custody or supervision of the cars after their delivery." There was no restriction by agreement or otherwise on the use to which the cars would be put by Merberg's employees or on the right of Merberg's employees to be on the cars in the course of their regular duties. It might be that a court of law would not sanction some outlandish use of a car or the presence of a Merberg employee on it for some purpose entirely unrelated to the

regular course of his duties, but such is certainly not the situation presented by the proof here.

Custody and control of the car which figured in the plaintiff's accident having been given to his employer under an unconditional delivery, Hanson obviously occupied the status of an invitee while on it, so long as he was there in pursuance of his regular duties. No claim is made by the defendant that at the time of the accident he was engaged in some personal activity having nothing to do with his work. On the contrary, it is conceded, as it must be, that he was furthering his employer's interest when he was hurt. Consequently, his status was that of an invitee of the defendant to whom was owed the duty of reasonable care. It is difficult to see by what reasoning he can be classed as a licensee.

In arriving at the conclusion that the plaintiff had exceeded the bounds of defendant's invitation in being on the car and that he thereby became a licensee, the court seized upon a single answer of the plaintiff which the defendant contended delineated the scope of the invitation. On direct examination the plaintiff was asked the following question:

> "Q. In the course of this operation you had from time to time used the railroad car which was placed on Dudley Street, had you not?"

and he made the answer:

> "A. Yes, sir."

Then he was asked:

> "Q. For what was that car used?"
> "A. Loading scrap iron to be shipped out" (R. 8, 11. 5-9).

On the basis of this last answer, the court adopted the defendant's contention that the use for loading scrap iron

provided the exclusive measure for determining the plaintiff's right to be on the car. This flies in the face of the stipulation of unconditional delivery and permits, in fact forces, the plaintiff by his testimony to affix a limitation upon an agreement relating to the use of the freight car to which he was not a party. He used the car from time to time for loading scrap iron. There is nothing in the record to show that that was the only use for which it was delivered to Merberg & Sons. If it was, the stipulation would have said so. It is fair to assume from the stipulation that the car was delivered for general purposes, for any purpose plaintiff's employer saw fit to use it which was in the ordinary course of its operations.

Invitation to be on premises or property is a legal status which comes about by agreement of the parties either express or implied. It is a bilateral arrangement. The mutual or bilateral arrangement here is expressed by the unqualified language of the stipulation, that is, the defendant delivered its cars to plaintiff's employer at the place of its operations. A unilateral limitation on the use of the cars self-imposed by the invitee without the knowledge of the invitor would not relate back and become a part of the general invitation agreement. In other words, a general invitee in the use of property does not by putting the property to a particular use of his own choosing thereby immediately limit his right to use forevermore to the particular use. Simply because Hanson put the defendant's freight cars to a particular use, the conclusion is not warranted that there was no right to use them, or for Hanson or other Merberg employees to be on them for any other purpose related to the general operation of his or their employer. Consequently, when he boarded the car to protect it and the cable of the crane during the ordinary course of his duties, he was within his rights as an invitee and en-

titled to have reasonable care exercised for his care by the defendant.

b) *Implied Invitation to Hanson.*

Assuming for the purpose of presenting a full argument here that the stipulation relating to the unconditional delivery of the freight car were not in the case and that the sole purpose for which the car was delivered to Hanson's employer's custody was for the loading thereon of scrap or salvaged steel and iron, there would still be a jury question presented as to whether or not Hanson was an invitee on the car by implication. There can be no question but that if he were on the car in connection with his regular work for any purpose reasonably connected with loading, he would be an invitee.

It is not our understanding of the law that when an invitation arises by implication as it does in this case, the precise bounds of the invitation are necessarily to be defined as a matter of law. Assuming for the purposes of argument, that notwithstanding the absence of express restriction of the right of the plaintiff to go upon the car, it can be said that as a matter of law he had no right upon it except for purposes of loading and unloading, there must certainly be included the right to be upon the car for any purpose *reasonably connected with the loading of the car.* The defendant seems to admit that this is so, because in its definition of the invitation to the plaintiff in its brief below, it included an invitation to *move the car for loading.* It is difficult for us to understand why he should have had any greater right to be upon the car for the purpose of moving it preparatory to loading it, than he had to be upon the car for the purpose of assisting in, and superintending an operation, which had to be completed before the material which was to be loaded upon the car would be available. According to the evidence, the tractor and crane were located at the only place suitable

for the operation of tearing down the wall. This, unfortunately, caused the car to interfere with the free use of the cable. There is nothing in the evidence to indicate that the employees of the Merberg company had any right to move the car from the position in which it was supposed to have been secured by the defendant's employees. As a matter of fact, there is ample evidence that during the many months cars had been in use on this job, none had ever been moved by the Merberg employees and it is reasonable to assume that it was not within the contemplation of either the plaintiff or the defendant that he had any right to move the car. Under the circumstances, what should he as a reasonable person have done? If he undertook to tear down the wall with the steel cable in contact with the top of the car, two difficulties would have been present. The side of the car might have been cut, or the strands of the cable might have been severed, or perhaps both of these things would have occurred. It is common knowledge that if a seven-eighths inch steel cable is broken when under the pressure required to tear down the side of a brick and steel building, the whipping of the loose ends constitutes a serious danger to life and limb. Furthermore, had this occurred, it is entirely possible that the wall would not have fallen and the scrap iron and steel from within it not have been made available for transportation upon the defendant's car. Thus, when the plaintiff went upon the car, he went in furtherance of a task, the accomplishment of which was requisite to use the car for purposes of loading. In these circumstances, we maintain that his act in going upon the car was in the course of the business of his employer, which business was well known to the defendant at the time of the delivery of the car and, further, that it was directly connected with the primary purpose for which the car was delivered, namely, the loading of it.

We submit that the case of *Murphy* v. *Core Joint Concrete Pipe Co.*, 110 N. J. L. 83, 164 Atl. 262, is analogous to the present case. The defendant occupied premises whereon it manufactured concrete pipe. The decedent was employed as a truck driver by a firm which had a contract with the defendant to cart pipe from its premises to such destinations as should be designated by the latter. The defendant maintained on its premises certain pits which were excavated to such a depth that normally the platforms of the truck onto which the pipes were loaded were on a level with the surrounding ground. On the day of the accident, the decedent, in accordance with the usual custom, backed his truck into one of the pits for the purpose of having sections of pipe loaded thereon. It was the duty of the defendant's employees to load the pipes, and the decedent had no part therein except to chock the pipes after they had been loaded. Rain had washed down the rear end of the pit considerably with the result that the bank sloped. In consequence of this, the rear platform of the truck could not completely reach the portion of the ground from which the pipes were to be rolled onto the truck, there being a space of a foot and a half between the truck and the level ground. In order to roll the pipes on the trucks the defendant's employees placed some planks between the platform of the truck and the ground. While rolling the pipes on the truck one of the planks broke with the result that the pipe skidded over to one side at an angle, with one end of the pipe resting on the side of the bank and the side of the pipe in contact with the truck. Thereupon the defendant's superintendent directed the decedent to pull his truck ahead in order that the defendant's employees could get down in the pit and with the aid of a supporting plank lift the pipe to the level ground. The decedent pulled his truck forward and then went to the rear of the truck and down into the pit to see if the truck was clear. While stand-

ing there, the plank which was supporting the pipe as the employees pushed it up on the side of the pit broke, with the result that it slid back into the pit and struck the decedent.

It was argued by the defendant that when the decedent left his truck and came back to the pit, he ceased to be an invitee upon the premises and became a licensee. The court, after reciting the familiar rules that the owner or occupier of lands who by invitation, express or implied, induces persons to come upon the premises is under a duty to exercise ordinary care to render the premises reasonably safe for purposes embraced in the invitation and that where the occupier of lands engages an independent contractor to do work upon his premises, an employee of the contractor while executing the work is there presumably by the request of the occupier and is an invitee, went on to say:

> "Applying these principles, there can be no doubt that at the time the decedent entered with his employer's truck upon the premises of the defendant for the purpose of carrying out the contract between his employer and the defendant, he was by implication an invitee upon such premises. There can likewise be no doubt that at the time he backed the truck into the pit for the purpose of having the pipe loaded thereon, he was upon the defendant's premises by virtue of an implied invitation. There can likewise be no doubt that, at the time he moved the truck forward in pursuance of the request of the defendant's superintendent, he was still an invitee upon the defendant's premises by implication.
>
> "The defendant contends, however, that after pulling the truck forward his status was changed from that of an invitee to that of a mere licensee. This contention apparently is based upon the assumption that the decedent had no right to go into the pit by the rear of his truck where he was injured. But such theory is ill-founded in point of fact. It entirely ignores the fact that it was open to the jury to find that he went to

the place where he received his injury for the purpose of ascertaining if he had cleared the pipe when he pulled his truck forward, as defendant's superintendent ordered him to do, and to be ready to nail in the 'chock' immediately when the pipe was put on the truck, as it was his duty to do.

"When, as here, it was open to the jury to infer from the evidence that, at the time of the accident, the decedent, in going forward in the pit, was naturally led to believe by the defendant's instructions, acts, and conduct that the defendant intended that he should do what he did and as he did, in carrying out the work which his employer had contracted to do for the defendant, the question whether he was an invitee was for the jury, and not for the trial judge."

If the strict rule which the defendant in our case urges had been applied in the cited case, the court could not have found that when the decedent entered the pit it was reasonably inferable that he was impliedly invited to do so. Strictly speaking, the only purpose for which he could leave his truck was to chock the pipe, and obviously, the mishap which had occurred prevented his chocking the pipe at the time he left his truck. Furthermore, if the strict rule urged by the defendant was applied, it could not be said that he had any right in the pit since ordinarily he chocked the pipes from the level ground, the pit being covered by the truck. However, the court did not take this narrow view of the scope of the decedent's invitation. It held that a factual question was presented as to whether or not the defendant extended an implied invitation to the decedent to enter the pit in furtherance of his duties to his employer. This case, we respectfully urge, substantiates our contention that the plaintiff in our case was impliedly invited by the defendant to be upon its car in furtherance of any work of his employer which was directly or indirectly connected with the use for which the car was delivered.

The decision in the case of *Weatherford, M. W. & N. W. Ry. Co.* v. *Duncan, et al.*, 32 S. W. 878 (Supreme Court of Texas) while of a foreign jurisdiction, is precisely in point with the present case. There, the defendant railroad company provided cars to a coal mining company for the purpose of transporting coal. The plaintiff decedent was an employee of the coal company, whose duties were to trim the slate from the coal, place the cars delivered by the railroad company to his employer on the scales and when they were loaded, to remove them therefrom and replace them by other cars to be likewise loaded. On the day of the accident, a box car was standing upon the scales and was partially loaded with coal. A short distance away from this car and upon the same track stood an empty car which had been left by the railroad company for the purpose of being loaded. Near this car, and on the same track, stood a flat car which had already been loaded with slate. While the cars were standing in this relative position the employees of the railroad, by a flying or drop switch, put three or four empty coal cars upon the track upon which the aforementioned cars were located. In doing so, the cars were sent at too great a speed and appeared to be headed for a collision with the car loaded with slate. The decedent, observing this, boarded the empty car (that is, the one between the slate car and the one which he was loading with coal). He was not called upon by the employees of the railroad to do this, but undertook it for the purpose of setting the brake upon the empty car and preventing a collision between it and the car which he was loading. The moving cars struck the car loaded with slate and drove it against the car in which the decedent was, as a result of which the decedent was thrown to the tracks and killed.

The defendant railroad company urged that the decedent was not rightfully upon the box car at the time he was killed, that is to say, his invitation to load the car and weigh

the cargo did not extend to his boarding a car at a time when it was not being loaded. In passing upon this question, the court said (R. 880):

> "From the facts found by the Court of Civil Appeals it appears that the car upon the scales, which was partially loaded with coal, as well as the empty box car upon the track upon which Duncan (decedent) was when injured, were under his control and protection as the employee of the Texas Coal & Fuel Co. He was charged with the duty, on behalf of his employer, to maintain the one in its position, and protect it, while being loaded, and until it was removed from the scales; and the other was under his control, to be by him placed in position for loading when it became necessary to do so. Duncan had the right to enter either car or to get upon the same *for any purpose connected with his employment;* and when a state of circumstances existed which threatened damage to the property in his charge, it became his duty, if necessary to do so, to get upon the empty box car, either to secure that in its place, or to prevent an interference with or injury to the car which was upon the scales."

The court further stated that the decedent stood in the same relation to the railroad company as *any other person would have who was rightfully upon the railroad tracks.*

In *Pittsburgh, C. C. & St. L. Ry. Co.* v. *Cozatl*, 79 N. E. 534 (Court of Appeals, Indiana), the plaintiff's employer entered a contract with the railroad company to repair a brick wall upon its premises. The plaintiff was employed by this independent contractor as a superintendent of the work. In the course of the work the plaintiff found it necessary to use a jack. His employer had not provided one and he decided to borrow one from the railroad company. Having obtained the jack from a part of the railroad company's premises which were not a subject of the repair contract between his employer and the railroad company, he returned to the place of the operation. Adjacent to this

place was a railroad track at the end of which was a bumping post. Bracing himself against the bumping post, he attempted to throw the jack across the track which lay between him and the building which was being repaired. At that instant, cars which were upon the track were moved by the employees of the railroad company and the car nearest the bumping post ran against it causing injury to the plaintiff. It was contended by the defendant that the invitation to the employees of the independent contractor did not give them the right to go upon the railroad track nor to stand in the position against the bumper in which the plaintiff was standing at the time of his injury and that, consequently, he was a mere licensee at such time. Furthermore, it was urged that since there was no agreement between the railroad company and either the plaintiff or his employer that the railroad company would furnish tools and appliances for doing the work, there was no invitation extended to the plaintiff to cross the tracks for the purpose of borrowing the jack. The court said (R. 538):

> "Upon the facts stated, we feel fully justified in holding that the appellee was not a trespasser. While working for an independent contractor he was doing work for the benefit of the appellant. He was on appellant's premises, where he had a right to be to do the work in which he was engaged. *We cannot adopt so narrow a view as to say that he was a trespasser unless he was in the exact spot or location where the actual work was being done.* His employment was not circumscribed within such narrow limits. In going to get the jack to aid in the prosecution of his work, he was in a place where he had a right to be, under the invitation of appellant."

In the case of *Rio Grande, E. P. & S. F. Ry. Co. et al.*, v. *Guzman*, 221 S. W. 1102 (Court of Civil Appeals of Texas), it appeared that the plaintiff, an employee of a consignee of the railroad company, was killed while attempting to

cross a railroad track, when a car upon it was shunted against him by other cars operated by the railroad company employees. The circumstances under which this happened were these: The car to be unloaded was, through the negligence of the defendant's servants, spotted a short distance from a loading platform rather than flush with the platform. The crew of the consignee were obliged to move the car to the platform before the unloading could be commenced. In order to do this, it was necessary to release the car in question from a string of cars to which it was attached. After the car had been so detached and moved for a distance of four feet, the decedent crossed the track through the opening. At this moment, the string of cars was struck and the decedent was crushed. It was contended by the defendant that the decedent was its invitee solely for the purpose of unloading the car. Such operation would ordinarily have been done from the loading platform and there would have been no occasion for his being upon the track. Consequently, it was contended that when he went upon the track, he exceeded the bounds of his invitation and became a licensee. The court said:

> "The circumstances under which the deceased was killed have been detailed, and it appears that at the time he was rightfully upon the premises and acting *in the furtherance of his master's interests.* The switching crew had failed to properly place the flat car, and in assisting in so doing deceased was doing what was absolutely necessary under the circumstances, and what appellant reasonably might have anticipated would be done.
>
> "He was not a volunteer, trespasser, nor mere licensee, but, on the contrary, a person to whom this appellant at the time owed the duty of ordinary care."

We respectfully submit that the facts in the present case sustain the view of the trial court that a factual question

was presented of whether or not the plaintiff at the time of the accident was impliedly invited by the defendant to go upon the railroad car in furtherance of his master's business.

c) *Plaintiff's Employer's Duty as a Bailee to Use Care to See that the Car Was Not Damaged, Made Plaintiff an Invitee by Implication when upon the Car for the Purpose of Preventing Damage to it.*

The relationship between the railroad company and the Merberg company as to the car was essentially that of bailor and bailee. It is fundamental that in a bailment for the mutual interest of the parties the bailee is under a duty to exercise reasonable care to preserve the object of the bailment in the condition in which it was when delivered, reasonable wear and tear excepted. At the time of this accident, the plaintiff was upon the railroad car not only in furtherance of his employer's business, but also for the purpose of preventing damage to the car which might have resulted from the steel cable coming in contact with the side of the car when pressure was applied to the cable. He was, therefore, discharging a duty owed by his employer to the railroad company. Since this duty by implication of law is presumed to be within the contemplation of the parties to the bailment, it follows that it must be within the contemplation of the said parties that employees of the bailee who are undertaking to discharge the duty are deemed to be invited upon the object of the bailment to effect this purpose. This is clearly set forth in *Weatherford, M. W. & N. W. Ry. Co.* v. *Duncan, et al., supra,* in the portion of the opinion quoted under "b)".

We, therefore, respectfully contend that upon this theory the plaintiff herein was rightfully upon the railroad car.

On the basis of all three reasons argued above, (a), (b)

and (c), it is respectfully urged that the plaintiff was an invitee on defendant's freight car at the time of his injury as a matter of law, or that, in its most unfavorable aspect to the plaintiff, the problem of invitation was one for determination by the jury. Consequently, the Circuit Court erred in holding otherwise and in reversing plaintiff's judgment.

POINT TWO.

The evidence adduced at the trial created a question of fact for determination by the jury as to the negligence of the defendant. The proof tended to show that the defendant failed to apply the brake and to chock the freight car as was required by the admitted custom and practice.

The question of whether or not the trial court was justified in submitting the issue of the defendant's negligence to the jury for determination while raised in the Circuit Court, was not passed upon there. The court limited itself to the invitation problem and having decided that problem adversely to the plaintiff, said that it was not necessary to consider the other grounds of appeal. With the thought that this Court may wish all of the phases of the case discussed, we are setting out under this point as briefly as possible our argument below as to the defendant's negligence.

It was contended below by the appellant upon this point, that the uncontradicted testimony of the employees who delivered the car, at the time of delivery the brake was applied and a chock placed under the wheels conclusively established this to be the fact. The cases upon this subject fail to substantiate this argument. In the case of *Smith* v. *New York, Susquehanna & Western R. R. Co.,* 46 N. J. L. 7, it appeared that the defendant left a loaded car coupled with two empty cars standing on a switch which inclined toward the main track, the same being secured by brakes and a rail-

road tie placed under the wheels of the loaded car. In some manner not accounted for by the evidence, the cars came upon the main track and thereby an accident occurred in which the plaintiff was injured. The defendant requested the court to charge that if the jury were satisfied that the loaded car had been made fast by means of a bar and brakes, at a safe distance from the main track, and was incapable of motion toward it without the removal of the bar and brake, and without the application of external force, the defendant was not guilty of negligence. A further request was made that the court charge that if the jury were satisfied that the car was braked and the collision was caused by loosening of the brake by an unlawful act of a stranger, the defendant was not guilty of negligence. In reviewing the propriety of the judicial action in denying these requests, the court, through Chief Justice Beasley, said:

> "Each of them, if adopted, committed the court to the doctrine that the action could not be supported if the cars in question were so securely fastened that but for the intervention of extraneous force they would not have got upon the main track, or if that, they would not have done so without the unlawful action of human agency. There is no legal measure by which it can be predicated as a matter of law, that if a loaded car can be placed on a switch which has an inclination towards the main track, such car being so secured by its brake and a railroad tie under its wheels that it cannot change its position without the removal of such safeguards, such car is to be considered as secured with that degree of care, and skill and prudence which the law requires to be exercised in such matters. Such a question is essentially one for the decision of the jury. The judge could not properly be called upon to pass any opinion as to the sufficiency of the means that had been employed, nor that such means were legal if they would have held the cars in position without the application of 'external force.'

"* * * If a person without right were upon the property of the company, and while there, from carelessness in passing, had trod upon and dislodged the railroad tie placed to keep the car in its position, and had thus been the cause of the accident, it is clear, in the words of the request, the 'loosening of the car,' would have been 'by the unlawful act of a stranger,' and yet, I think it would not necessarily follow that the company would have been irresponsible for the consequences. I am not aware of any legal principle that would justify a railroad company in leaving loaded cars in such a situation that they could be caused to run on to its main track in the way of its passing trains, by the carelessness of persons passing by or by the act of children playing near their switches."

In the case of *Hendershot* v. *New York, Susquehanna & Western R. R. Co.* (N. J. not reported in official reports), 138 Atl. 206, the plaintiff, while riding in an engine, was in collision with two freight cars which came down a steep grade unmanned. There was evidence that the hand brakes upon one of the cars had been set and the cars coupled together. There was also evidence that wooden blocks were placed under the wheels of the cars. The court said that from the fact that the brake did not hold the cars, it could be inferred that the brake was not in an efficient and proper condition, and from the fact that the wooden blocks did not prevent the cars from moving, it could be inferred that the blocks had been placed under the wheels in a negligent manner.

The reasoning of these decisions is the same in principle as that in the cases of "runaway" automobiles. In *Spanko et al.* v. *Spitalnick*, 101 N. J. L. 5, 127 Atl. 663, the facts were that the defendant stopped his automobile on a down grade and at the curb. He left it unattended and while he was gone, it started down the street, mounted a curb and struck the plaintiff, who was standing on the sidewalk. The

defendant testified that before leaving the car he had applied his brake and turned the front wheel against the curbing. The court held that it was open to the jury as reasonable men "to discredit the defendant's testimony in whole or in part as to cautionary measures and to find that the machine started because of his failure to take reasonable care in securing or safeguarding it when he left it standing on the down grade."

In *Sheridan* v. *Arrow Sanitary Laundry Co. et al.*, 105 N. J. L. 608, 146 Atl. 191, the evidence was similar to that adduced in the *Spanko* case *supra*. A car had been parked upon a down grade and in some unexplained manner started up and after running some distance collided with the plaintiff, injuring him. The driver of the automobile testified that he had applied the brakes and had stopped the car with the right front wheel resting against the curb. He also said that he had tried the brake after the accident and it was "O. K." He further said that following the happening the brake bands had been tested and found to be in sound condition. Justice Case, speaking for the New Jersey Court of Errors and Appeals, said:

> "The unexplained presence upon the public highway of this 'runaway' motor truck, without driver or occupant, moving along the highway to the far side thereof, mounting the curb and doing serious physical injury to a person lawfully there, raises a prima facie presumption of negligence upon the part of the owner and on the part of the owner's employee in whose charge the car was.
>
> "We think that there was evidence sufficient to raise a jury question as to whether defendant's driver had exercised such care as a person of ordinary prudence would exercise in the circumstances. Did he adequately brake the car? There was evidence susceptible of the version that the car when it arrived at the scene of the accident was not braked. * * *."

In this case, as in the *Spanko* case, the refusal of the court to direct in favor of the defendant was affirmed.

In the present case, there is evidence that immediately after Hanson was injured the brakes on this car were found to have been released, and there is also evidence that no chocks were beneath the wheels of the car. The defendant, in answer to this testimony, offers the testimony of the crew which placed the car upon the track. Arthur Dolce, who was in charge of this crew, testified that he had applied the hand brake and that chocks were placed under the front wheels of the car by the witness, George Naughton (R. 334, 11. 12-20). This was done on September 22 and it was not until September 24 that he learned of the happening of the accident. In the course of cross-examination the importance of an efficient chock and of the proper placing of such chock under the wheels became apparent. He testified that a chock is placed under the wheels to secure the car and that this is always done when a car is placed upon a "public street or highway" (R. 335, 11. 17-25). On redirect examination he indicated that when cars are placed upon public highways it is necessary to be very careful in the placing of the chocks (R. 338, 1. 20). George Naughton, who assisted in placing the car, and who is said to have placed the chock under the wheel, was interrogated at some length concerning the type of chock used (R. 334, 345, 346, 347). Having in mind the emphasis placed by the railroad employees upon the necessity for placing the chock on cars spotted upon a public highway, his description of the chock was very interesting. It appears from his testimony that the railroad company did not provide the employees with wood to be used for chocking purposes, but that the employees used any piece of scrap wood they were able to find in the vicinity of the car. These scraps could be of any kind of wood and of any thickness, providing they were at least one-half inch thick (R. 346, 1. 5), and he

said that if a chock one-half inch thick had been placed under the wheel, this car, weighing twenty-one tons, would have been held in place on this grade even if the brakes had been released (R. 345, l. 23; R. 346, l. 23).

James Dever, the engineer who towed the car to the track, substantiated the testimony of the other two witnesses on direct examination. On cross-examination, however, he admitted that the reason why he testified that the car was braked properly and chocked properly was that it was the practice to brake and chock cars (R. 352). It was inferable, therefore, that he was testifying as to a general practice rather than from his recollection of what was done in this case.

The testimony of these witnesses could have led the jury to conclude that the brakes were in good condition and were properly applied; likewise, that the chocks used were fit for the purposes for which they were used, and so placed that the defendant had fully discharged its duty to those who were lawfully on and about the car. However, the jury was not bound to come to this conclusion and was at liberty to find from the happening of the accident itself, or from the description of the method employed by the defendant's servants in securing the car that the defendant was negligent. Furthermore, from this testimony it could be concluded that all of these witnesses were testifying as to the proper practice to be employed and not from a definite recollection of what was done by them. In the latter event, the jury could infer that the testimony amounted to nothing more than a statement of the standard of care and offered nothing in support of a contention that the standard had been complied with.

It is, therefore, respectfully urged that the trial court was correct in holding that there was ample evidence in the case from which the defendant's negligence might be inferred.

It is respectfully submitted on the whole case that the Circuit Court of Appeals erred in reversing plaintiff's judgment and that a Writ of Certiorari should be allowed to review the reversal.

JAMES RAYMOND BERRY,
Counsel for Petitioner.

(5055)

FILED
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CHARLES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 240

HARRY HANSON,

Petitioner,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

EDWARD A. MARKLEY,
Counsel for Lehigh Valley Railroad Company.

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SUPREME COURT OF THE UNITED STATES

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(1)

Statement of the Case.

The plaintiff's action was brought to recover damages resulting from personal injuries sustained by him due to the alleged negligence of the defendant. The plaintiff was employed by Charles Merberg & Sons. Merberg & Sons were engaged in demolishing the refining plant of the American Sugar Company in Jersey City, New Jersey. This plant consisted of a large number of buildings occupying two square city blocks (R. 29, ll. 20-25). It was bounded on the east by Washington Street, on the west by Warren Street, on the north by Essex Street, and on the south by the Gap (a river) (R. 6 and 7; R. 30, ll. 1-20). Dudley Street, run-

ning east and west, was located approximately midway between Essex Street on the north and the Gap on the south (R. 30, ll. 20-25). A railroad track owned by the defendant was located in the center of Dudley Street, extending from Washington Street to and across Warren Street. This track had a slight down grade toward Warren Street.

The entire area occupied by the Sugar Company buildings, including both ends of Dudley Street, was enclosed by a fence (R. 34, l. 20, to R. 35, l. 20). This fence had been constructed by Merberg & Sons. It consisted of wooden posts extending upright four or five feet above the ground, with rails fastened from post to post at the top and midway between the top and the ground (R. 36, ll. 1-25). A gate was built across the track on Dudley Street at Warren Street (R. 34, l. 20, to R. 35, l. 20). Merberg & Sons maintained a day and night watchman to protect this area and their property contained within it (R. 33, ll. 20-23).

As the buildings were demolished large quantities of valuable scrap iron and steel were salvaged. In order to ship this material the defendant, a common carrier by railroad, placed at the request of Merberg employees, steel gondola cars on the track on Dudley Street for the purpose of being loaded (R. 8, ll. 5-10). These cars would be placed by the employees of the defendant. It was the custom and practice of the defendant's employees upon delivering the car on this track, to apply the hand brake and to place a piece of wood called a chock in front of one of the wheels (R. 4, and 5; R. 8, ll. 20-25; R. 9, ll. 5-10). The defendant had no control, custody or supervision of the cars after their delivery.

On the afternoon of September 22, 1936, a train crew of the defendant placed a car on this track and before leaving it they applied the hand brake and placed a chock in front of one of the wheels (R. 332-334). This car was delivered about 1 P. M., according to the train crew, or about 4 P. M.,

according to the plaintiff's witness (R. 112, ll. 5-10; R. 333, ll. 20-25; R. 342, l. 15, to R. 343, l. 10). The car, approximately fifty feet in length, was placed about fifty feet east from Warren Street (R. 36, ll. 10-20).

On the morning of September 23, 1936, about 11 or 11:15 A. M., the plaintiff was injured. He was the general superintendent of the entire job with approximately fifty men working under him. These men were divided into a number of small gangs, consisting of four or five men each (R. 7). One of these gangs at the time of the accident was engaged in tearing down the wall of the building located north of Dudley Street (R. 31, ll. 1-5). This work was being done by using a steel cable, one end of which was tied to the top of the wall and the other to a crane. The crane provided the power used to pull down the wall. This cable, made of steel, was seven-eighths of an inch in diameter and about three hundred feet long (R. 38, ll. 1-10). The wall to which it was attached was one hundred and fifty to two hundred feet north of the track (R. 41, ll. 1-25), about fifty feet east of the car (R. 73, l. 15, to R. 74, l. 5), and about ninety feet high (R. 41, ll. 1-25). The crane was fifteen or twenty feet south of the track and approximately in a line with the center of the car standing thereon (R. 44, ll. 10-25). The car had been partly loaded with about four tons of scrap iron (R. 46, l. 20, to R. 47, l. 10). This loading was being done by a different gang, from a pile of steel scrap on the ground which one of the men was cutting into short lengths (R. 143, ll. 1-15).

The cable was lifted over the top of the car (R. 45, ll. 12-15), and fastened to the axle of the crane located about two feet above the ground (R. 43, ll. 20-25). The plaintiff got into the car solely to place a plank between the top of the car on the south side thereof and his company's cable (R. 52, ll. 5-10; R. 53, ll. 1-10). He used an old plank eight feet long, three inches thick and eight inches wide (R. 50,

ll. 5-15). The sole purpose of placing this plank was to prevent the cable from being scraped and damaged by the edge of the car (R. 11, ll. 5-10). The plaintiff placed the plank lengthwise on top of the side of the car with the eight-inch surface of the plank on the four or five-inch surface of the car in about the center of the car (R. 15, ll. 20-25; R. 53, l. 20, to R. 54, l. 5). He then ordered the crane operator to move the crane so as to place a strain on the cable in order to take out the slack (R. 15, ll. 1-15). The crane moved in a southwesterly direction (R. 45, ll. 1-12.) The plaintiff, standing in the car, held the end of the plank while the strain was put on the cable by the movement of the crane (R. 55, ll. 1-8). The plaintiff then turned to walk toward the west end of the car when the car moved five or six feet to the west (R. 57, ll. 5-20). The plank which he had placed between the car and the cable whipped inside the car and struck him across the legs, causing his injury (R. 58, ll. 18-25). It was his intention to get out of the car before the pull was made which would bring down the wall (R. 60, ll. 15-20), for the reason that the flying bricks might reach the car (R. 61, ll. 1-10).

Fellow employees who came to the plaintiff's assistance testified that the brake on the car was not applied immediately after the accident and that there was no chock under the car wheel when they inspected a half hour after the accident.

(2)

ARGUMENT.

I.

Jurisdiction.

The defendant objects to the jurisdiction of the Court to grant the writ of certiorari.

The petition states the jurisdiction of this Court to be Section 240 of the Judicial Code (28 U. S. C. A., Sec. 347,

p. 359). That section provides that in any civil case in a Circuit Court of Appeals, it shall be competent for the Supreme Court of the United States to require by certiorari either before or after a judgment or decree by such lower court, that the cause be certified to it for determination, with the same power and authority and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

In this case the petitioner recovered a money judgment in the United States District Court for the District of New Jersey, which on appeal to the United States Circuit Court of Appeals for the Third Circuit was reversed and "the cause remanded to the said district court with directions that a *venire de novo* issue, and that any further proceedings had shall be conformable with the opinion of this Court" (R. 20). Except in extraordinary cases the writ of certiorari is not issued until final judgment or decree, and this case cannot possibly be considered one coming within the category of an extraordinary case.

Hamilton Shoe Co. v. *Wolf Bros.*, 240 U. S. 251, 258;
American Construction Co. v. *Jacksonville Railway*, 148 U. S. 372, 378, 384;
The Three Friends, 166 U. S. 1, 49;
The Conqueror, 166 U. S. 110, 113;
Denver v. *New York Trust Co.*, 229 U. S. 123, 133.

It is urged in the petition for this writ of certiorari that jurisdiction should be taken because (a) the Circuit Court of Appeals decided the case in conflict with the decisions of the State of New Jersey, and (b) it overlooked a stipulation which was part of the evidence in the cause submitted to it (p. 8 of petition). That the Circuit Court of Appeals under *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, applied the law of New Jersey to the case is clear from an examination of its opinion. It must be assumed that

it took into consideration all of the record before it, which included among other things the stipulation mentioned.

The jurisdiction to bring up cases by certiorari from the Circuit Court of Appeals was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Its purpose, as indicated by Rule 38-(51) of this Court, is to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. *Magnum Co.* v. *Coty*, 262 U. S. 159, 163.

It is urged as a further ground for invoking this Court's jurisdiction, that the ruling in this case is in conflict with the decisions of other Circuit and State Courts. This case was decided, as it had to be under the law of the State of New Jersey, without regard to the decisions of other Circuit or State Courts. *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64.

II.

The plaintiff was a mere licensee on the car of the defendant at the time of the accident and the United States Circuit Court of Appeals did not err in reversing the judgment.

The liability of the defendant must be determined by the common law of the State of New Jersey (where the accident occurred), and the decisions of that State accepted as such common law.

Erie R. R. Co. v. *Tompkins*, 304 U. S. 64.

The defendant as a common carrier was required by law to deliver cars to Merberg & Sons upon its request. Upon the delivery of such cars there arose, by operation of law, an implied invitation to the employees of Merberg & Sons to use the cars for the purposes for which they were delivered. The purpose for which these cars were delivered was

to be loaded with freight (scrap iron and steel) and later to be transported over the defendant's railroad.

If the injury to the plaintiff had occurred when he was engaged in loading the car or in moving the car to a place for loading—loading the car or moving it for loading being in each instance a purpose for which the defendant had delivered the car—the plaintiff would have been an invitee and the defendant under a duty to exercise reasonable care for his safety.

According to the undisputed evidence, however, the injury to this plaintiff occurred when he was engaged in using the car for a purpose entirely foreign from the loading or anything reasonably connected with the loading. His status, therefore, was that of a licensee to whom the only duty owing was to refrain from wanton or wilful injury, of which concededly there was no proof.

We shall discuss the New Jersey cases which substantiate the legal principles above enunciated.

New York & New Jersey Telephone Co. v. *Speicher*, 59 N. J. L. 23 (Supreme Court). The plaintiff in this case was an employee of a city. The pole from which he fell was owned and erected by the defendant telephone company. It was maintained in a public street upon condition that the topmost crossbar should be used by the city to carry the fire alarm wires. The Court in holding that a direction of a verdict in favor of the defendant should have been granted said (R. 24 and 25):

> "Assuming that the telephone company, invited Speicher to mount and descend the pole in discharging his duties to the city, in regard to its wires, what did it invite him to make use of in going up and coming down? Clearly, it would be held to the duty of reasonable care as to the strength and fitness of the pole to carry, the wires and the workman engaged in arranging and repairing them.

"But the sole object of the cross-bars is to carry the wires. He who maintains the cross-bars does it for that purpose, and his duty is thus limited. It is not perceived how his duty in that respect is extended by proof that linemen, in climbing, usually lay hold of and rely upon the cross-bars for support, in whole or in part. That custom is not, in this case brought home to the knowledge of the telephone company, but if it were it could not operate to compel them to make cross-bars intended for one purpose sufficiently strong for another purpose for which they were never intended. No invitation to use the cross-bars can be deemed to be extended to the lineman. When, therefore, a lineman makes use of a cross-bar in climbing, he steps beyond the limit of his invitation, and he who invited him to climb by the pole has no liability for any resulting injury.

"It results that it was error to permit the jury to consider whether the telephone company took reasonable care to have the cross-bar safe, and there should have been a direction for a verdict for the company, on the ground that it owed no duty to Speicher in respect to the cross-bar."

Furey v. *N. Y. C. & H. R. R. Co.*, 67 N. J. L. 270. This action was for personal injuries received by plaintiff upon the property of the defendant. The property in question was an enclosed shed that covered the central portion of a river pier, and was occupied by longitudinal lines of railroad tracks, upon which freight cars were loaded and unloaded. While attempting to cross the southernmost of these lines, the plaintiff was injured by the coming together of two freight cars between which he was about to pass. These cars were moved by the defendant without notice to the plaintiff. The plaintiff's contention was that the defendant should have given him some signal reasonably adapted to serve as a warning to him. The plaintiff was an employee of a painting contractor who, under contract with the defendant, was painting the outside of its shed.

The plaintiff had been on the job about two weeks and at the time he was injured, was quitting work for the day. His errand in the interior of the shed was to exchange his working clothes for his street dress, which was on the second floor of the shed. His purpose in passing between the cars was to reach a flight of steps at the west end of the building. He had been working upon the southeast corner of the shed.

On the question of invitation the trial Court held that an invitation to the plaintiff to use the opening between the cars as a crossing might be implied from the knowledge of the defendant's servants that such use was being made of the opening by the painters. In reversing a judgment recovered by the plaintiff the Court said:

> "Upon the case thus exhibited the paramount question is not whether the plaintiff was upon the defendant's property generally by way of invitation, but whether, upon any aspect of the testimony, the defendant can be said to have invited the plaintiff to make use of the openings between the freight cars as crossings of the railroad tracks in its shed. (P. 274) * * *
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> "The general definition of invitation originally given by Chief Justice Bigelow, in *Sweeny* v. *Old Colony and Newport Railroad Co.*, 10 Allen 368, and adopted by this court in the opinion delivered in *Phillips* v. *Library Co., ubi supra*, is in these words:
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> " 'The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place

was adapted and prepared or allowed to be used.' To which was added in original opinion the following:

"'A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter on and pass over his premises he thereby assumes an obligation that they are in a safe condition, suitable to such use, and for a breach of this obligation he is liable in damages to a person injured thereby' (pp. 274-275).

* * * * * * *

"Applying these definitions and tests to the circumstances of the present case, it is incumbent upon the plaintiff either to show that the opening between the cars was, in fact, designed to be used as he used it, or else to bring home to the defendant some act or conduct signifying that the place was so prepared or adapted which might naturally lead the plaintiff to suppose that he might properly and safely so use it. For these purposes, three lines of proof are available —*first*, as to the openings themselves; *second*, as to the use made of them by the employes of the defendant, and *third*, as to the use suffered to be made of them by the plaintiff and his associates.

"With respect to the openings themselves, it is an established fact that they resulted, not from design, but from the exigencies of the business transacted on the pier, and that they varied from day to day with the physical conditions that gave rise to them, viz., the placing of each car opposite to a door in the side of the shed. The use of these openings by the stevedores and train hands employed about the defendant's business was not evidence of any expectation or willingness on the part of the defendant that persons not so employed should use the openings. The fact that the plaintiff and his co-servants had repeatedly, without molestation, crossed the track through the openings in the broken freight trains could not, in the absence of any sign of preparation or adaptation, have evinced to

them that the openings were intended for their convenience, or that the general system from which the openings resulted was operated for their accommodation or had their safety in view. The character of the traffic and the obvious conditions that necessitated the breaking of the trains forbade such an implication in any ordinarily discerning mind. The plaintiff and his associates, by taking advantage of a constantly changing condition of things that evidently arose from causes unconnected with their presence upon the premises, could not impose upon the defendant a relationship to which it had, by no act of omission or commission, in anywise contributed. Knowledge is an element of invitation only when it is capable of throwing light upon the object with which a given use may have been permitted. Standing alone, it implies permission, but not invitation (pp. 275-276).

* * * * * * *

"There is still another phase of the case upon which nothing needs to be said, excepting that no decision with respect to it is to be inferred from this opinion. I refer to the nature of the errand of the plaintiff in the interior of the shed as bearing upon the question of invitation. His object was to exchange his working clothes for his street dress. If this was 'a matter in which the company had no concern,' to use the words of Mr. Justice Gummere in *Fitzpatrick* v. *Glass Manufacturing Co.*, 32 Vroom 378, it may be that 'he was saved from being a trespasser only by the fact that the company permitted him to come upon its premises for that purpose' " (p. 278).

Gavin v. *O'Connor*, 99 N. J. L. 162 (Errors and Appeals). Plaintiff's intestate, a boy eight years old, was fatally injured in the back yard attached to a two-family house belonging to the defendant, by the fall of a clothes pole erected and maintained by the defendant to support clothes lines extended from the house. Plaintiff and his family were tenants on the ground floor and the intestate was his

son, who, with several other boys, was playing in the back yard at the time. The pole was damaged and had been repaired by patching, but it had stood up until that time under the strain of such washed clothes as were hung on the lines and this was the sole purpose for which it was intended. At the time of the accident there were no clothes hung out but a line extended from the plaintiff's back window to the pole, and at least one of the boys was swaying on the line holding the rope in his hands and trying to touch the ground with his knees; and it was at this precise juncture that the pole fell. Affirming a judgment of nonsuit the court said:

> "The rule is thoroughly established in this state that the liability of the owner or occupier of premises who expressly or impliedly invites others to enter thereon is only co-extensive with his invitation; his duty of care is limited by that, and when the limits of the invitation are exceeded, it ceases, except as to acts willfully injurious. (p. 164) * * *
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> "The rule has been uniformly applied by our courts in cases where some structural appliance has given way, and injury has resulted. The question in each case is, was the party injured invited, expressly or by implication, to make use of the appliance, whatever it was, in the way in which he did use it? If he was, a duty of care was raised; otherwise not (p. 164).
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> "In the case at bar, the evidence raises no such question. Obviously, a clothes pole is not erected in the backyard of a tenement, and clothes lines extended thereto, for boys to swing on. If one of these boys had been sliding down the baluster rail of the front stairs, and it had broken with his weight, or if he had climbed to the top of the pole and it had fallen with him, we venture to say that no court would hold that there was any duty of the owner to provide a stair rail that would hold a sliding boy, or a clothes pole that

would be appropriate and adequate for him to climb. If the boys were invited to use the yard, and the pole had broken under the strain of a normal amount of clothes on the lines, a different case would be presented; but we are unable to see in this case anything beyond a use of the pole for a purpose never contemplated by the defendant, and as to which use he was under no duty of care" (pp. 165-166).

Liveright v. *Lifsitz Furniture Co.*, 117 N. J. L. 243 (Errors and Appeals). The plaintiff in this case was a furniture salesman. He entered defendant's furniture store for the purpose of selling furniture. He made no sale. He endeavored to buy a piece of novelty furniture for a friend, but the defendant did not have it in stock. He used the defendant's 'phone to make a personal call and then inquired as to the location of the toilet, as well as asked permission to use the same. He fell and was injured while entering the toilet. The court, holding as a matter of law that he was a mere licensee, said:

"The only question involved is what duty was owing by the defendant to the plaintiff under the circumstances as presented by the proof. It was the duty of the defendant to exercise ordinary care to render the premises reasonably safe for invitees thereon, so long as the invitee did not go beyond the bounds of the invitation. The implied invitation to enter the store which was incident to the sale or purchase of furniture, did not constitute an invitation to the plaintiff to use either the telephone or the toilet in the store, and when he used these facilities for his own purpose and benefit, his status became that of a licensee, and this being so, the defendant was only liable for willful injury. Neither the telephone nor toilet was maintained by the defendant for the use and accommodation of customers, and such use was not within the limits of the implied invitation to the plaintiff.

"It is well established in this state that the liability of an inviter is circumscribed by the invitation and

does not extend to invitees whose injuries are received while using the premises not within the limits of the invitation, and the mere passive acquiescence by the owner in a certain use of his property imposes no obligation upon him to keep it in a safe condition for the benefit of the user" (p. 244).

Saunders v. *Eastern Hydraulic Brick Co.*, 63 N. J. L. 554 (Errors and Appeals). The plaintiff in this case was a workman in the employ of the defendant. One of the defendant's buildings in which it carried on its business, had a roof, nearly flat, in which was a "skylight" fitted for two panes of glass, 20 x 40. The skylight was on about the same plane as the roof, and there was a mullion, dividing the frame and sustaining the contiguous parts of the panes of glass. One of the panes was broken, and the plaintiff, who was a glazier, was directed by the defendant to put a new pane in the place of the broken one. In attempting to do so, plaintiff put his hand upon the centerpiece or mullion and leaned with so much weight of his body upon it as to break it.

The court in affirming a judgment of nonsuit said:

"But the purpose of the mullion in this skylight was to aid in the support of the panes of glass. The master's duty was to have it so constructed as to reasonably answer that purpose, but it is impossible to discover any ground in reason for imposing upon the master any duty to have it so constructed as to bear the weight or any part of the weight of a servant, although engaged in repairing it.

"The duty of the master in this respect is like that of one who invites another to make use of some place or appliance and is limited to the care requisite for the reasonable use thereof for the purposes for which it is designed. *New York and New Jersey Telephone Co.* v. *Speicher*, 30 Vroom 23, S. C., 31 Id. 242.

"Doubtless the work of replacing the glass would have required the use of some force upon the mullion

to remove the old putty. The case indicates that the mullion broke under plaintiff's pressure before he had begun to exert force for that purpose. In that aspect it is plain that defendant was not liable for plaintiff's injury, because, as just stated, it owed him no duty to furnish a mullion strong enough to bear his weight or any part of it."

Carey v. *Gray*, 98 N. J. L. 217 (Errors and Appeals). Defendants were the owner and tenant respectively of a house. The tenant employed the plaintiff to disinfect the house. The plaintiff went to the house, which was unoccupied, at night, to do this work. While thus engaged he desired to use a toilet. He found the one in the house out of repair and not usable. He left the house and discovered in the yard of the premises, a closet, which he entered and was injured in so doing. The court, in affirming a judgment of nonsuit, said:

"Our reports contain numerous cases where persons who have been invited upon premises have sustained injuries for which the owner or occupier has been held not to be responsible because the invitee has used the premises for a purpose not included within the bounds of the invitation (p. 220).

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"Let us then apply these legal principles to the facts of the present case. The defendant, Flynn, engaged the plaintiff to disinfect the house. When the plaintiff went to the house for this purpose, he was upon the premises by the implied invitation of Flynn. Flynn owed him the duty, while engaged in his work, of exercising ordinary care to render the premises reasonably safe for the work for which he was engaged. The implied invitation to enter the house, which was an incident to the contract made between Flynn and the plaintiff, was not an invitation to the plaintiff to use, if occasion required, either the toilet in the house

or the closet in the yard. The plaintiff was a workman casually employed to work in an unoccupied house which he knew from observation, before he went to the yard, was out of repair. He was not a servant and member of a household to whom a master would owe a duty to use ordinary care to furnish reasonably safe toilet facilities. When the plaintiff left his work to seek a toilet he was pursuing a purpose of his own. He was then exceeding the bounds of his invitation. He was deprived during his search for a toilet of the right of protection against dangers or pitfalls upon the premises which he enjoyed while prosecuting the work for which he was hired. His status became that of a licensee. When the plaintiff went to the yard and entered the defective closet he did so at his own risk, and Flynn was not responsible for his injuries. It follows that if Flynn, who had hired the plaintiff, is not liable to the plaintiff, that the owners of the premises, Mr. and Mrs. Gray, who had no knowledge that the plaintiff was to enter upon the premises, are also not liable to the plaintiff'' (pp. 221-222).

Ryerson v. *Bathgate*, 67 N. J. L. 337 (Errors and Appeals). The plaintiff kept a small place of business in Newark, and the defendants were the proprietors of a meat shop nearby, which was in charge of one Silvernail as manager. The plaintiff owned a cat, of which she desired to be rid, and this fact she made known to Silvernail, who told her that the defendants needed a cat, and suggested that she bring it over to them. Accordingly, a few days later, she carried over the cat and upon entering the defendant's premises found Silvernail there alone. As she entered, she told him that he must put the cat in a closet or else it would run away. Silvernail thereupon walked to the opposite side of the room, opened a door and said, ''Put her in here.'' Plaintiff supposed it to be a closet. Silvernail only partially opened the door, and as he did so she ran and stooped to put the cat down. The cat at the time was scratching her and she was anxious to get it out of her

arms. She did not look in beyond the open doorway, but took it for granted the opening led to a closet. The opening in fact led to a cellar and as she stepped inside she fell down the stairs.

The trial Court nonsuited the plaintiff and this ruling was affirmed on appeal. The Court said:

> "* * * The owner's liability for the condition of the premises is only co-extensive with his invitation. And it is incumbent upon the plaintiff to show, not only that her entry upon the premises was by invitation of the owner, but also that at the time the injury was received she was in that part of the premises into which she was invited to enter, and was using them in a manner authorized by the invitation, whether express or implied (pp. 338-339).
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> "The case shows that Silvernail formed a correct judgment of the exigencies of the problem, and that the plaintiff did not. He opened the cellar door barely wide enough to enable her to inject the cat according to the approved method, at the same time saying, 'Put her in here.' That was the extent of the invitation. The plaintiff exceeded the bounds of the invitation, and in doing so became a mere licensee" (p. 340).

Ackley v. *W. J. & S. R. R. Co.*, 76 N. J. L. 741 (Errors and Appeals). Plaintiff, the consignee of a carload of stone, was notified by the defendant railroad that the car had arrived and he was required to unload it within a fixed time in order to avoid the payment of demurrage. The plaintiff, with his employees, went to the company's property for the purpose of unloading the cargo and found that the car had been placed upon a side track parallel with the main line track. He was able to approach the opposite side of the car without obstruction, and he thereupon caused his wagon to be placed along that side of the car and proceeded to remove the stones from the car to the wagon. The stones were so heavy that they could not be taken from

the car to the wagon without the use of a piece of timber. The plaintiff took a piece of timber and placed it so as to reach from the car to the wagon. This timber was so long that it extended beyond the side of the car which was nearest to the main line track. While the timber was in this position, an engine moving on the main line struck it, as a result of which the plaintiff was injured.

The plaintiff was nonsuited in the trial Court and that judgment was affirmed in the Court of Errors and Appeals. On the question of invitation the Court said:

> "The plaintiff was on defendant's premises by invitation, for the placing of the car upon the side track where it could be unloaded, and the notification to unload, was an invitation to go upon the defendant's premises for that purpose, and defendant owed to plaintiff a degree of care co-extensive with it, but the extent of the invitation is the limit of defendant's duty in the premises, and the extent of such duty must be gathered by implication from the circumstances established by the undisputed testimony. We are asked in this case to infer that because the plaintiff was invited to the defendant's premises to unload a car, such an invitation implied the right to obstruct the passage of trains along a track adjacent to the car being unloaded, with a timber which the plaintiff brought upon the premises for the purpose of moving the stone from the car to a wagon standing on the side of the car away from the main line (p. 742).
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> "No inference can be drawn from the evidence in this case that the defendant knew, or ought to have known, that when it invited the plaintiff on its premises for the purpose of unloading the car, he would bring there a timber fourteen feet in length and so place it on the car as to project over it a sufficient distance to come in contact with trains passing along another track, and there is no evidence of any act or conduct of the defendant that affords a reasonable basis for the claim

that it had led the plaintiff to believe that it intended its invitation to go to that extent. Nor is there any evidence to support a reasonable inference that the plaintiff had any such belief.

"The application of the rule always depends upon the particular facts of the case under consideration, for the owner's liability is only co-extensive with his invitation, and it is incumbent upon the plaintiff to show that, at the time the injury was received, he was acting within the limit of his invitation, and that there was a reasonable basis for a belief, on the part of the inviter, that the invitation implied the right to create the situation under which it is claimed the rule becomes applicable.

"In this case the invitation was to go upon the premises and by necessary implication with horses, wagons and required appliances, to unload the car on the side of it away from the main line, and the mere using of the main track, in the absence of any notification that in carrying out the purpose of the invitation the plaintiff was about to infringe on that track, was no breach of the invitation given" (pp. 743 and 744).

III.

The plaintiff failed to prove that defendant's employees did not apply the brake and chock the car as required by custom.

The car in question was delivered by the defendant into the exclusive custody and control of the plaintiff's employer on the day before the accident. This delivery was either about 1 P. M., or between 4 and 5 P. M., on that date (R. 112, 11. 5-10; R. 333, 11. 20-25). The testimony of the defendant's conductor and trainmen is uncontradicted that when the car was delivered they applied the hand brake and placed a wooden chock under the wheel (R. 334, 11. 10-25; R. 342, 1. 15, to R. 343, 1. 10). The plaintiff and his fellow employees worked until 5 P. M. on the night before the accident and from 7 to 11 A. M. on the day

of the accident. During this time they had loaded at least four tons of scrap iron into this car (R. 46, l. 20, to p. 47, l. 10). During the night of September 22nd, the car was under the care of a night watchman working under the plaintiff. No proof was offered to negative the idea that while the car was in the exclusive control of the plaintiff the hand brake had not been released or the chock removed.

The proof offered to establish that the defendant failed to brake or chock the car consisted of three items, viz., (1) that the car moved six or seven feet at the time of the accident; (2) that the brake was not applied when inspected immediately after the accident (R. 145, ll. 18-25) and (3) that there was no chock under the wheel a half hour after the accident (R. 116, ll. 13-20; R. 118, ll. 5-15).

The trial court apparently felt the jury could infer from the proof that because the brake was not applied and the chock not in place after the accident, the defendant's servants did not apply the brake or place the chock. If no proof had been offered by the defendant perhaps this inference would have been permissible, this for the reason that the defendant's failure to show facts necessarily within its knowledge would be in the nature of an admission against it that the facts proven by the plaintiff were true. In this case, however, the defendant did show by positive and uncontradicted testimony that the brake was applied and the chock placed when the car was delivered. The plaintiff had it within his power to show that no change had occurred between the time the car was delivered and the time of his accident. It was, we respectfully contend, his duty to produce such proof and his failure to produce it is in the nature of an admission against him in that respect.

Conclusion.

It is respectfully submitted that the petition for the writ of certiorari should be denied.

Dated: July 25, 1941.
Jersey City, New Jersey.

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